Office-Supreme Court, U.S.
FILED
JAN 19 1985
ALEXANDER L. STEVAS, CLERK

No. 84-933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD A. HECHENBERGER, WILLIAM V. WILKEN, and CHARLES W. RAMSEY,
Petitioners,

vs.

WESTERN ELECTRIC CO., INC., now known as AT&T TECHNOLOGIES, INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now known in part as AT&T TECHNOLOGIES SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC. and SOUTHWESTERN BELL TELEPHONE PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as SOUTHWESTERN BELL TELEPHONE SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, and RICHARD ROUSSELOT, Director, Division of Workers' Compensation, State of Missouri,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS WESTERN ELECTRIC CO., INC. (NOW KNOWN AS AT&T TECHNOLOGIES, INC.) AND ITS SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

D. J. SULLIVAN*
RICHARD A. AHRENS
JOHN J. MOELLERING
LEWIS & RICE
611 Olive Street, Suite 1400
St. Louis, Missouri 63101
(314) 444-7600

Attorneys for Respondents Western Electric Co., Inc., now known as AT&T Technologies, Inc., and its Plan.

*Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

21

QUESTION RESTATED

Whether this case was properly dismissed on grounds of mootness where the challenged practice of reducing certain workers' compensation payments by the amount of benefits previously paid under disability plans has not been and never will be applied to petitioners because the respondent employers abandoned the practice of asserting such offsets and the applicable state law has been amended to prohibit these offsets.

TABLE OF CONTENTS

	Page
Question Restated	i
Table of Authorities	iii
Statement of the Case	2
Reasons for Denying Certiorari	4
Conclusion	6

TABLE OF AUTHORITIES

Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980) 5

Anderson v. Alpha Portland Industries, Inc., 727 F.2d 177 (8th Cir. 1984) 5

Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972) 4

Franks v. Bowman Transportation Co., 424 U.S. 747, 754-56 (1976) 4

Hall v. Beals, 396 U.S. 45 (1969) 4

Imler v. Southwestern Bell Telephone Co., 650 P.2d 712 (Kan. App. 1982) 5

Kross v. Western Electric Co., Inc., 701 F.2d 1238 (7th Cir. 1983) 5

Massachusetts Mutual Life Insurance Co. v. Russell, *certiorari granted,* No. 84-9, 53 U.S.L.W. 3235 (Oct. 2, 1984) 5

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 5

Preiser v. Newkirk, 422 U.S. 395, 402 (1975) 4

Schneider Moving & Storage Co. v. Robbins, 52 U.S.L.W. 4476 (U.S. Apr. 18, 1984) 5

Vitek v. Jones, 445 U.S. 480, 487 (1980) 4

Weinstein v. Bradford, 423 U.S. 147 (1975) 4

Other Authorities

29 U.S.C. §1001, *et seq.* 2

Rule 28.1, Rules of the Supreme Court of the United States 2

No. 84-933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD A. HECHENBERGER, WILLIAM V. WILKEN, and CHARLES W. RAMSEY,
Petitioners,

vs.

WESTERN ELECTRIC CO., INC., now known as AT&T TECHNOLOGIES, INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now known in part as AT&T TECHNOLOGIES SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC. and SOUTHWESTERN BELL TELEPHONE PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as SOUTHWESTERN BELL TELEPHONE SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, and RICHARD ROUSSELOT, Director, Division of Workers' Compensation, State of Missouri,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS WESTERN ELECTRIC CO., INC. (NOW KNOWN AS AT&T TECHNOLOGIES, INC.) AND ITS SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioners are three individual employees, one of whom, Richard A. Hechenberger,[1] was an employee of respondent Western Electric.[2] They seek review of a decision of the Eighth Circuit that dismissed a challenge to an administrative practice of the Missouri Division of Workers' Compensation on grounds of mootness. Under the challenged practice, a Missouri employer had been permitted to reduce the amount of certain payments made to an employee under the Missouri state workers' compensation law by amounts that had been previously paid to the employee under the employer's disability plan. Petitioners claimed that the state law permitting these offsets was preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001 *et. seq.* ("ERISA") and that the fiduciaries of the Western Electric and Southwestern Bell disability plans at issue would have violated their duties to petitioners if they had asserted these "offset" claims against them.

---

[1] Although the claims of all three petitioners are frivolous, respondent Western Electric's interest is, of course, confined to petitioner Hechenberger's claims.

[2] Statement Required by Rule 28.1: Respondent Western Electric Company, which changed its name to AT&T Technologies, Inc. on January 1, 1984, is a wholly-owned subsidiary of American Telephone and Telegraph Company ("AT&T"). AT&T has no parent company. In addition to its other wholly-owned subsidiaries, AT&T has ownership interests either directly or through wholly-owned subsidiaries in the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti & C., S.P.A.; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc.; AT&T and Philips Telecommunications, B.V.; and Share Tech, Inc.

The basis for the Eighth Circuit's holding that the petitioners' substantive claims are moot is that the challenged practice has never been and never will be applied to any of the petitioners.[3] Each petitioner was paid the full amount of his benefits under the respective disability plan, and Western Electric announced that it had abandoned its practice of seeking offsets while petitioner Hechenberger's workers' compensation claim was still pending before the Missouri Division of Workers' Compensation. Most fundamentally, the Missouri legislature has amended its workers' compensation statute to prohibit the offsetting of disability benefits against workers' compensation benefits, so there is no possibility that the practice could be applied to Hechenberger (whose workers' compensation claim is still pending) or any other employee in the future in Missouri.

---

[3] The District Court dismissed the individual claims as moot before it ruled on the motions for class certification. (Supplemental appendix to Petition, p. SA-4—SA-5)

REASONS FOR DENYING CERTIORARI

The Eighth Circuit's decision neither possesses national importance nor is otherwise review-worthy. Rather, it is simply a correct application of well-established principles of Federal jurisdiction. Few propositions are better settled than that a Federal court may not adjudicate the legality of a practice where, as here, the challenged conduct has ceased, there is no "reasonable expectation" that the challenged practice will recur, and the challenged conduct had no direct or other consequences for the individual plaintiffs. *Preiser v. Newkirk,* 422 U.S. 395, 402 (1975); *Accord, Vitek v. Jones,* 445 U.S. 480, 487 (1980). Indeed, the Court has repeatedly held that where, as here, a challenged provision of a state statute has been amended so as to afford the relief requested by the individual plaintiffs, the claim is moot and must be dismissed. See *e.g., Hall v. Beals,* 396 U.S. 45 (1969); *Diffenderfer v. Central Baptist Church,* 404 U.S. 412 (1972).[4]

---

[4] The fact that petitioners purported to bring a class action has no pertinence to the application of the mootness doctrine here. As the Eighth Circuit observed below, nothing prevented an employee actually subjected to an offset, prior to the amendment of the state statute, from suing on the basis of such practice. The Court further noted:

> Precisely such an action is currently pending in the United States District Court for the Eastern District of Missouri, and is docketed as *Clemens v. Southwestern Bell Telephone Co.,* No. 84-0756C(3). Class certification has been requested in that case. (Appendix A to Petition, p. A-5)

A second action involving the challenged practice is also pending in the United States District Court for the Eastern District of Missouri. *Wilken v. AT&T Technologies, Inc.,* No. 83-2198C(3).

Moreover, because the offset issue is not one that is "capable of repetition, yet evading review" and because no decision was made on class certification before the individual plaintiffs' claims were mooted, there could be no basis for adjudicating plaintiffs' claims in any event. See *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 754-56 (1976); *Weinstein v. Bradford,* 423 U.S. 147 (1975).

Three additional questions that petitioners attempt to raise are each also foreclosed by the Eighth Circuit's holding on mootness.

Petitioners first argue that the courts below should have addressed whether the plans' fiduciaries were guilty of dual loyalty and adversarial conduct. The short answer to this claim is that the fiduciaries engaged in *no* conduct that injured petitioners. Each petitioner was timely paid all benefits due under the plans and the respondent employers did not and could not offset those payments in the workers' compensation proceedings administered by the Missouri Division of Workers' Compensation.[5]

Petitioners next argue that the Court of Appeals erred in not deciding whether ERISA provides a remedy to so called "discouragees"—employees allegedly discouraged by fiduciary misconduct from seeking plan benefits. Yet none of the peti-

---

[5] Further, despite the fact that Western Electric's employee, Hechenberger, claims that he has been denied benefits under the plan, he never filed a claim with the Employees' Benefit Committee (which administers the plan), nor was any denial of an asserted claim ever presented to that committee for review. It is fundamental that an individual who seeks benefits under ERISA must first exhaust his plan remedies, in order to afford the plan fiduciaries an opportunity to review the claim and so obviate judicial action. *Anderson v. Alpha Portland Industries, Inc.*, 727 F.2d 177 (8th Cir. 1984); *Kross v. Western Electric Co., Inc.* 701 F.2d 1238 (7th Cir. 1983). See *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980); *Imler v. Southwestern Bell Telephone Co.*, 650 P.2d 712 (Kan. App. 1982).

Hechenberger's inability to show that he has been harmed by any act or decision of Respondents makes *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) and *Schneider Moving & Storage Co. v. Robbins*, 52 U.S.L.W. 4476 (U.S. Apr. 18, 1984), wholly inapposite. Quite simply, Hechenberger's claims, which were never ripe for presentation, were rendered moot in the subsequent course of events. Similarly, *Massachusetts Mutual Life Insurance Co. v. Russell, certiorari granted* No. 84-9, 53 U.S.L.W. 3235 (Oct. 2, 1984) is inapposite. Whatever this Court decides in *Massachusetts Mutual*, the decisive point is that that case was not moot and this case is.

tioners was a discouragee because all petitioners sought *and received* all payments due them under the plans. This is especially so in the case of Western Electric's employee, Hechenberger, for he sought benefits under both the plan and workers' compensation; indeed his workers' compensation claim is currently pending.

Finally, petitioners assert that the courts below should have decided whether ERISA allows additional so-called "extracontractual" damages for violations of respondents' benefit plans and for the offset practice. Because petitioners suffered no injury either under the plans (from which they received full payments) or from the offset practice (which was not applied to them), there is no basis for any claim of extracontractual damages. It too is moot.

CONCLUSION

For all the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LEWIS & RICE

D. J. Sullivan*
Richard A. Ahrens
John J. Moellering

611 Olive Street, Suite 1400
St. Louis, Missouri 63101
314/444-7600

Attorneys for Respondents
Western Electric Co., Inc.
now known as AT&T
Technologies, Inc. and its Plan

*Counsel of Record

January 16, 1985